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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 270

ROBERT M. BRADY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 98-100) is reported at 404 F. 2d 601. The memorandum opinion of the district court (A. 89-92) is not reported.

JURISDICTION

The judgment of the court of appeals (A. 101) was entered on December 17, 1968. On March 13, 1969, Mr. Justice White extended the time for the filing of a petition for a writ of certiorari to and including April 16, 1969, and the petition was filed on that date. The petition was granted on June 23, 1969 (A. 102; 395 U.S. 976). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court's finding in *United States v. Jackson*, 390 U.S. 570, that the death penalty provision of the Federal Kidnapping Act "needlessly encouraged" guilty pleas and jury waivers requires the setting aside of a pre-*Jackson* guilty plea which, under traditional standards for determining the voluntariness of a guilty plea, was voluntarily entered.

STATEMENT

In January 1959, petitioner, together with Alfonso Pedro Tafoya, was charged by a one-count indictment filed in the United States District Court for the District of New Mexico with kidnapping one Barbara Ann Steger for the purpose of rape, transporting her in interstate commerce from Albuquerque, New Mexico, to El Paso, Texas, and not liberating her unharmed (A. 13).

1. Both defendants were originally represented by Robert Hoath LaFollette and Gilberto Espinosa (A. 24). Mr. LaFollette had thirty years of experience in criminal law and had represented many capital defendants (A. 63-64). Mr. Espinosa, who had been in practice since 1921, had been an assistant United States attorney for fourteen years, and had also defended hundreds of criminal cases (A. 56-57). Both attorneys appeared at arraignment, where the defendants pleaded not guilty (A. 23-25).

Thereafter, Mr. LaFollette, who was retained by petitioner's family (A. 63), assumed the major burden of his defense, while Tafoya retained David Chavez, Jr., formerly a United States District Judge for

Puerto Rico (A. 5, 11, 83); subsequent to his representation of Tafoya, Mr. Chavez was appointed Chief Justice of the Supreme Court of New Mexico (A. 77). Mr. Espinosa assisted both counsel.

On April 30, 1959, in the presence of their attorneys, both defendants changed their pleas to guilty. Mr. Espinosa represented to the court that petitioner understood the contents of the indictment and was pleading guilty voluntarily and with full understanding of the situation (A. 27). The court then addressed the defendants personally, inquiring whether they understood that a death penalty could be imposed only if a jury so recommended, but that in the absence of a jury they could receive sentences up to life imprisonment. The court further inquired whether any promises had been made to them by anybody in regard to length of sentence. Both defendants acknowledged that they were aware of the possible sentences and that no promises had been made (*ibid.*). The judge then stated that, while there was authority for empaneling a jury to consider whether death sentences should be imposed, he did not approve of the procedure and was of the opinion that capital punishment was not appropriate in their cases (A. 27-28). Each defendant was then asked separately if he was guilty or not guilty, and each stated that he was guilty (A. 28).

On May 8, 1959, both defendants were sentenced to fifty years' imprisonment (A. 32), which was thereafter reduced to thirty years. Before imposing sentence, the court, noting a statement which petitioner had made to the probation officer, asked him if he

wished to withdraw his guilty plea and plead not guilty (A. 29). Petitioner replied that he desired to "let the plea stand," and acknowledged that in doing so he was admitting and confessing the truth of the charge and was pleading guilty voluntarily, without persuasion or coercion of any kind (A. 29-30).

2. On September 20, 1967, petitioner filed a motion in the district court pursuant to 28 U.S.C. 2255, alleging that his guilty plea had been coerced by (1) fear of the death penalty, (2) the importuning of counsel, and (3) the promise of executive clemency to be procured by the political efforts of Judge Chavez and his brother, Senator Chavez, both of whom were relatives of Tafoya (A. 4-5).¹ An evidentiary hearing was held on this motion. Testifying in his own behalf, petitioner asserted that he was not guilty and had never considered himself guilty of the offense (A. 46), that he had informed his counsel that he was not guilty (A. 40), that his original intent was to plead not guilty (A. 39), that he believed that he would be acquitted (A. 42), and that he did not believe that he was guilty when he changed his plea (A. 45). He claimed that his decision to plead guilty came at a conference among all defendants and counsel on the day that the plea was entered, when he was shown Tafoya's confession which implicated him (A. 44); he said that, prior to that time, he had no knowledge

¹ He also alleged that the trial court, in accepting his plea, failed to comply fully with the requirements of Rule 11, F. R. Crim. P. (A. 5-6), but this claim was never pressed.

that Tafoya had confessed (A. 39-40, 47).² At that conference, he asserted, "every effort was made to induce me to plead guilty" (A. 43). He said that Mr. Espinosa asked him how he expected to be acquitted when the confession would be used against him, and that Mr. LaFollette told him that if he went to trial there was a great possibility that he would get the death sentence (A. 44). Since he was depending upon Tafoya to testify for him, he concluded that the latter, who he heard intended to plead guilty, would lack credibility as a witness on his behalf (A. 45).³ In sum, petitioner claimed that his plea was motivated by "[m]y attorneys, statements by Alfonso Tafoya, [and] the great risk of the death sentence" (*ibid.*).

Mr. LaFollette testified that, at their first conference in January, petitioner was "obdurate" in his wish to go to trial. The attorney made no suggestions to the contrary, since the possibility of legal and factual defenses remained to be investigated (A. 67). Thereafter, he went to El Paso to interview potential witnesses suggested by petitioner and "did a great deal of briefing involving the question of the Tafoya confession" (A. 64). The United States Attorney's

² Tafoya, however, testified at the hearing that he informed petitioner of his confession the first night that they both were in jail (A. 55). Mr. LaFollette testified that he received a copy of Tafoya's confession from petitioner at their first conference, the night after petitioner's arrest (A. 69). The court specifically found that petitioner had known about the confession shortly after it was given (A. 91).

³ Although petitioner thus implied that he had no knowledge, prior to the conference, that Tafoya intended to plead guilty, he stated on cross-examination that he learned from his mother of Tafoya's intention ten days previously (A. 47-48).

office showed him the statements of prospective government witnesses, several of which he found to be very damaging (A. 64-65). He concluded that the Tafoya confession was accurate and not coerced, but he determined—and so informed petitioner—that it could not be used against him (A. 72-74). When he was informed by Judge Chavez that Tafoya would plead guilty, however, he concluded that there was no choice but for petitioner to do the same (A. 65, 69). The guilty plea would free Tafoya to be a government witness, and Mr. LaFollette concluded that he would make a very credible and damaging witness (A. 67-68). The evidence which the attorney knew to be available to the government was such that, as he informed petitioner several times, conviction was almost certain (A. 70, 75). The court had let it be known that he would not agree to a bench trial (A. 73). In light of the total circumstances of the case, he concluded that a capital recommendation by the jury, while not a certainty, was a distinct possibility (A. 70, 71, 75).⁴ Before he could advise petitioner to plead guilty, however, the latter—who had also heard that Tafoya intended to change his plea—stated that he wished to enter a guilty plea (A. 65, 68, 70).

3. At the conclusion of the Section 2255 hearing, the court held that petitioner's plea "was voluntarily

⁴ The court, when informed that defendants wished to change their pleas, commented that the decision was wise, since the question of the death penalty would have been submitted to the jury and a capital recommendation was likely (A. 71, 72). The testimony of Mr. LaFollette is unclear, however, as to whether, except at arraignment (see A. 23), the court had ever mentioned the possibility of capital punishment prior to being informed of the change of plea.

given without any duress, without any threats, without any promises, or without anything" (A. 76). Thereafter, in a memorandum decision and order filed one week after the hearing, the court considered the district court's decision in *United States v. Jackson*, 262 F. Supp. 716 (D. Conn.) (which was then pending on appeal to this Court) and held that the Kidnapping Act was constitutional but that, in any event, the guilty plea was tendered "by reason of other matters and not by reason of the statute" (A. 90). The court specifically found that petitioner was motivated to plead guilty by knowledge that his co-defendant intended to do so (*ibid.*). It found that Mr. LaFollette had rendered effective assistance to petitioner, and that, while the attorney had concluded that a guilty plea was the best course of action, petitioner had independently arrived at that decision (A. 91). It further found that no representations had been made to petitioner in regard to sentence or clemency (A. 92), that no comments by the district judge who accepted his plea were relayed to him before he decided to change his plea to guilty (A. 91), and that no pressures were put upon him by his attorney or anyone else to plead guilty (*ibid.*). The court thus concluded that the plea was "voluntarily and knowingly made," and was not induced by "any promise, representation, or coercion whatsoever" (A. 92).

The court of appeals, which rendered its decision subsequent to this Court's decision in *United States v. Jackson*, 390 U.S. 570, held that "[t]he finding of the trial court that the guilty plea was not made because of the statute but because of other matters is

supported by substantial evidence and is binding upon us" (A. 99). Determining that the district court's other findings were also supported by the evidence (A. 99-100), it concluded that "[w]e are convinced that the appellant voluntarily pleaded guilty" (A. 99).

ARGUMENT

SUMMARY AND INTRODUCTION

The basic problem posed by this case is the effect, if any, of this Court's decision in *United States v. Jackson*, 390 U.S. 570, on the validity of a conviction entered prior to *Jackson* on the defendant's plea of guilty to a capital charge under the Federal Kidnapping Act.

The Court in *Jackson* held the capital punishment provision of the Federal Kidnapping Act unconstitutional, finding that it imposed "an impermissible burden upon the assertion of [the] constitutional right" to a jury trial. For Jackson, who had not yet pleaded to the indictment, and future defendants prosecuted under the kidnapping law, this decision meant that a trial before a jury could not result in a sentence of death. There is no doubt that this right is equally applicable to previously convicted defendants who were made to suffer the "impermissible burden"—i.e., any defendant under sentence of death is entitled to be resentenced.³ Although this result would not seem to follow directly from the stated rationale of *Jackson*, considerations of

³ See *Pope v. United States*, 392 U.S. 651. Accordingly, this is not a case where refusal of retroactive application of the right asserted by petitioner would result in later litigants being treated differently than the litigant in whose case the right was announced. Compare *Desist v. United States*, 394 U.S. 244, 255 (Douglas J., dissenting), 258 (Harlan, J., dissenting).

due process would prevent carrying out the execution of persons who subjected themselves to a risk of the death penalty which under the Constitution they were not required to bear.

Since petitioner in this case pleaded guilty to the indictment, he obviously was not penalized for exercising his right to a jury trial. His challenge to his conviction is premised on that part of the rationale of the *Jackson* opinion in which the Court concluded that the death penalty provision had the "inevitable effect" of "needlessly" encouraging guilty pleas and jury waivers (390 U.S. at 581-583). The Court's concern with this consequence of the statute suggests two ways in which the *Jackson* decision might affect the validity of a guilty plea entered at a time when the death penalty provision had not been stricken.

The first approach to the problem, essentially adopted by the petitioner in the instant case, is that the rationale of *Jackson* constitutes a declaration that all guilty pleas entered prior to *Jackson* are invalid because the statutory scheme violated the defendant's "right" to determine his plea without "needless encouragement" to plead guilty. As we show below (pp. 12-14, *infra*), however, the Court in *Jackson* specifically rejected the suggestion that its decision had the effect of automatically invalidating all previous guilty pleas under the kidnapping act. In addition, even if the *Jackson* decision is authority for a right to be free from "needless encouragement", the principles announced by this Court in recent decisions dealing with the question of retroactivity of newly announced rights lead to the conclusion that effectuation

of such a right does not require the automatic release of all defendants who had pleaded guilty prior to *Jackson*.

The second way in which *Jackson* may be interpreted as affecting prior guilty pleas is under the theory that it announces new standards to be applied within the established rule that an involuntary guilty plea is invalid and subject to collateral attack.⁶ This is the approach taken by the Fourth Circuit in *Alford v. North Carolina*, 405 F. 2d 340, No. 50, this Term (probable jurisdiction noted, 394 U.S. 956), in which the court held that the impermissibility of the encouragement is a factor to be taken into consideration in determining the voluntariness of the guilty plea, and that a plea which is "principally motivated" by a desire to avoid the death penalty is involuntary. In our view, however, this interpretation of *Jackson* misconstrues the import of the Court's conclusion that the statute "unnecessarily" discouraged exercise of the right to trial by jury. Insofar as it is relevant to the question of voluntariness, that conclusion may be viewed as a justification for invalidating the death penalty provision without detailed findings as the extent to which it actually caused involuntary guilty pleas or jury waivers; the lack of necessity for the discouragement added nothing to its potentiality for compulsion.

Finally, when the facts of the present case are tested under the traditional standard for determining the voluntariness of a guilty plea—i.e., whether fear of the death penalty overcame the capacity to make

⁶ See, e.g., *Machibroda v. United States*, 368 U.S. 487, 493; *Waley v. Johnston*, 316 U.S. 101, 104; *Walker v. Johnston*, 312 U.S. 275, 286; see also *Herman v. Claudy*, 350 U.S. 116, 118.

a free and rational decision—we submit that petitioner's guilty plea was voluntary (*infra*, pp. 31-38). The evidence adduced at the postconviction hearing shows that petitioner determined to plead guilty after his codefendant, who had confessed to the crime and implicated petitioner, had announced his intention to plead guilty. Petitioner's decision was confirmed by the advice of competent counsel, after thorough investigation of the government's case and the possible theories of defense, that there was no hope for acquittal after trial. The fact that petitioner in these circumstances was influenced by the fact that a guilty plea would remove any risk of a death sentence does not establish that his plea was involuntary.

PETITIONER'S GUILTY PLEA, WHICH THE COURTS BELOW FOUND WAS VOLUNTARILY ENTERED UNDER ESTABLISHED STANDARDS FOR TESTING THE VOLUNTARINESS OF A GUILTY PLEA, SHOULD NOT BE SET ASIDE BY REASON OF THIS COURT'S DECISION IN *UNITED STATES V. JACKSON*

A. THE COURT'S FINDING IN *Jackson* THAT THE FEDERAL KIDNAPING ACT "NEEDLESSLY ENCOURAGED" GUILTY PLEAS DID NOT ESTABLISH A PRINCIPLE WHICH IS APPLICABLE RETROACTIVELY TO INVALIDATE ALL PRE-*Jackson* GUILTY PLEAS WITHOUT A SHOWING THAT THE PLEA WAS INVOLUNTARY

The implicit premise of petitioner's argument is that the Court's reasoning in *Jackson*, that the death penalty provision of the kidnapping act "needlessly encourag[ed]" guilty pleas and jury waivers, was equivalent to the announcement of a constitutional "right" to be free from such needless encouragement. Petitioner concludes that this "right" should be given retroactive application in behalf of all defendants who pleaded guilty to capital kidnapping indictments

or waived jury trial prior to *Jackson*.⁷ Although petitioner's argument appears to contemplate that there would have to be a showing that the defendant in fact had been "needlessly encouraged" by the availability of the death penalty after a jury trial, the rule for which petitioner argues would necessarily require the setting aside of all prior convictions. The Court in *Jackson* found that the "inevitable effect" of the capital punishment provision was to encourage guilty pleas and jury waivers, and it held as a matter of law that this encouragement was "needless" (390 U.S. at 581-583). As a practical matter, all that remains to be shown under petitioner's submission is that the death penalty was a "definite factor" in the defendant's decision (Br. 35), and it is virtually impossible to imagine a case in which a defendant did not take into account that his guilty plea would obviate any risk of a death sentence.

1. Even if it is assumed that the rationale of *Jackson* can be viewed as a resting solely on an implicit "right" to be free from "needless encouragement"—an assumption which may be unfounded, see pp. 19-22, *infra*—we submit that this right may not be invoked in collateral attack on pre-*Jackson* convictions. Before discussing the principles announced in recent decisions dealing with the retroactivity question, it is important to point

⁷ Although petitioner phrases his argument in terms that a "needlessly encouraged" guilty plea is "involuntary" as a matter of law (Br. 34), his resort to the involuntariness concept is nothing more than a vehicle to justify the application of the *Jackson* rationale to pre-*Jackson* guilty pleas. His submission assumes that "involuntariness" is a concept which is discrete from "coerced" (Br. 35), a distinction for which we can find no authority.

out that the Court in *Jackson* specifically negated any inference of retroactive effect of the rationale on which petitioner relies. The Court said (390 U.S. at 583).

It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily. * * * [Emphasis in original.]

The Court added in a footnote (*ibid.*, N. 25):

* * * So, too, in *Griffin v. California*, 380 U.S. 609, the Court held that comment on a defendant's failure to testify imposes an impermissible penalty on the exercise of the right to remain silent at trial. Yet it obviously does not follow that every defendant who ever testified at a pre-*Griffin* trial in a State where the prosecution could have commented upon his failure to do so is entitled to automatic release upon the theory that his testimony must be regarded as compelled.

In the same footnote, the Court cited *Laboy v. New Jersey*, 266 F. Supp. 581, 584 (D. N.J.), in which

the district court held that although the defendant in that case "was greatly upset by the possibility of receiving the death penalty," his *non vult* plea was not coerced under traditional standards and therefore was not subject to collateral attack. Although the Court's comments in *Jackson* concerned collateral attacks on the ground of "involuntariness", which we discuss below, it is unlikely that the Court would have specifically rejected the suggestion that all previous guilty pleas were involuntary if it had contemplated that all such pleas would be subject to collateral attack on the independent "needless encouragement" ground which is the basis of petitioner's argument.

This Court's decisions establish that the determination whether a newly enunciated right is to be given retroactive or only prospective application depends upon "the purpose" which the right serves, "the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application." *Johnson v. New Jersey*, 384 U.S. 719, 727; see *Stovall v. Denno*, 388 U.S. 293, 297. Reference to all three criteria militates against petitioner's contention that the rationale of *Jackson* may be invoked to set aside pre-*Jackson* guilty pleas.

The adverse effect on the administration of justice of making retroactive the right not to be "needlessly encouraged" would probably be substantial, in terms both of the number of persons affected and the seriousness of the offenses of which they were convicted. There are at least ten cases presently in the courts in which a federal prisoner convicted on a guilty plea

seeks release upon the basis of *Jackson*.⁸ As of June 1969, there were approximately 120 federal prisoners in custody for pre-*Jackson* convictions of kidnapping on the basis of guilty pleas or bench trial, although an unknown number of these prisoners may not have been charged in capital indictments; approximately 35 other prisoners were in custody for similar pre-*Jackson* convictions of rape in violation of D.C. Code, § 22-2801 (which also required a jury recommendation for imposition of the death penalty). There are an additional, but undeterminable, number of federal prisoners who had pleaded guilty to or been convicted by bench trial of kidnapping or killing in the course of a bank robbery (the penalty for which was death if the jury so directed).⁹

⁸ *McFarland v. United States*, petition for certiorari pending, No. 830 Misc., this Term; *Lone v. United States*, appeal pending, C.A. 9, No. 24958; *Wilson v. United States*, appeal pending, C.A. 4, No. 14023; *Tafoya v. United States*, Civ. No. 7615, D. N.M., motion pending (petitioner's codefendant); *Drake v. United States*, No. IP 68-C-197, S.D. Ind., decided October 15, 1969; *Taylor v. United States*, No. 4-67 Civ. 246, D. Minn., 4th Div., motion pending; *McNabola v. United States*, C.A. 6875-N, E.D. Va., Nor. Div., motion pending; *Pindell v. United States*, Civ. No. 19222, D. Conn., pending on remand; *Fritts v. United States*, Civ. No. 18797, D. Md., motion pending; *Overman v. United States*, No. 1857, W.D. Tenn., E. Div., decided September 24, 1969, on appeal to C.A. 6.

⁹ The figures are derived in the following manner: Bureau of Prisons statistics show that as of June 1969, there were 172 federal prisoners in custody for kidnapping who had been convicted as of June 1968, the date of the *Jackson* decision. Figures of the Administrative Office of the United States Courts show that between 1951 and 1968, there were a total of 669 convictions for violation of the kidnapping act, of which 485, or over 70%, resulted from pleas of guilty or *nolo contendere* or bench trials (453 on pleas, 32 after bench trials). Seventy percent of 172 is 120. Relevant figures for District of Columbia

In addition, there is an undetermined number of State prisoners who would be entitled to release under the theory advanced by petitioner in this case. The death penalty for certain offenses was preconditioned on a jury recommendation in three States: aggravated rape (Nevada Rev. Stat. [1967], § 200.363), aggravated kidnapping (Wyoming Stat. [1957], § 6-59), and first degree murder (New Hampshire Rev. Stat. Ann. [1955], § 585:4). If the North Carolina capital sentencing structure is held invalid under *Jackson*, the rationale of such a decision may call into question the present or former sentencing procedures in at least three other states,¹⁰ and a court-fashioned procedure in a fourth.¹¹ See Brief for Respondent, *Parker v. North Carolina*, No. 268, this Term, pp. 26-27.

rape convictions (obtained from the Bureau of Prisons and the D.C. Department of Corrections) show a total of 91 prisoners in custody who had been convicted as of June 1968. Between 1952 and 1968, Administrative Office figures show a total of 171 convictions—60 on pleas of guilty or nolo contendere and 5 after bench trials, for a total of 65, or 38%. This would produce an estimate of 35 in custody as of June 1968 who pleaded guilty or waived jury trial. We can make no estimate in regard to bank robbery because the Bureau of Prisons does not distinguish between those charged with the capital and those charged with the non-capital offense.

¹⁰ See New Jersey Stat. Ann., §§ 2A:113-3, 2A:113-4; Vernon's Ann. Code Crim. Proc. of Texas, Art. 1.14; West's La. Code Crim. Proc., tit. 16, art. 557; N.Y. Penal Law of 1909, §§ 1045(2), 1250(B), added L. 1963, c. 994, §§ 1, 3 (rescinded in 1967); South Carolina Code (1968 Supp.), § 17-553.4. The South Carolina provision was held unconstitutional on the authority of *Jackson* by the State supreme court, but the court's remedy was to invalidate the ameliorative provision rather than the capital one. See *State v. Harper*, 162 S.E. 2d 712, 715 (1968).

¹¹ The Supreme Court of Mississippi has interpreted the capital statutes of the State as authorizing only a jury to assess the death penalty. *Dickerson v. State*, 202 Miss. 804, 807 32 So. 2d

With the exception of the Nevada Supreme Court's decision in *Spillers v. State*, 436 P. 2d 18, 22-23 (1968), the result in *Jackson* was not foreshadowed.¹² On the other hand, prior to this Court's decision the reasoning of the district court in *Jackson* had been rejected by three other district courts. See *McDowell v. United States*, 274 F. Supp. 426, 429-431 (E.D. Tenn.); *Laboy v. New Jersey*, *supra*, 266 F. Supp. at 584-585; *Robinson v. United States*, 264 F. Supp. 146, 151-152 (W.D. Ky.), affirmed (after *Jackson*), 394 F. 2d 823 (C.A. 6), certiorari denied, 393 U.S. 1057. Indeed, prior to *Jackson*, some members of this Court had suggested that the requirement of jury authorization for imposition of the death sentence was ameliorative and preferable to legislation which granted the judge sole authority to impose capital punishment. See *Rosenberg v. United States*, 346 U.S. 273, 299 (Black, J., dissenting), 317 (Appendix to Opinion of Douglas, J., dissenting). There was no reason for the judge who accepted petitioner's plea in this case to believe that the Constitution barred either his acceptance of the plea or his submission of the sentence issue to the jury in the event that petitioner had elected a jury trial.

Finally, and most importantly, retroactive application of a defendant's right to determine his plea with-

881 (*en banc*, 1947); *Bullock v. Harpole*, 223 Miss. 486, 494, 102 So. 2d 687, 690 (1958).

¹² In an early decision, the Court of Appeals for the District of Columbia, in holding that a judge was under no compulsion to accept a guilty plea to rape, had suggested that the authority to accept a guilty plea might be lacking in order to harmonize the statute with the Sixth Amendment (*Green v. United States*, 40 App. D.C. 426, 429-430 (1913)), but the suggestion was thereafter treated as unpersuasive dictum. *United States v. Willis*, 75 F. Supp. 629, 630 (D.D.C.).

out "needless encouragement" would not be required to satisfy the purpose of such a rule, which petitioner claims is the avoidance of the "potentiality for inducing involuntary pleas of guilty" (Br. 21). If "needless encouragement" constituted coercion of guilty pleas (which we show it does not, see pp. 22-30 *infra*), retroactivity would be necessary. See *Kercheval v. United States*, 274 U.S. 220, 223. A guilty plea which is actually coerced calls into question "the reliability of the fact-finding process," *Johnson v. New Jersey*, *supra*, 384 U.S. at 729, and "infect[s] a criminal proceeding with the clear danger of convicting the innocent." *Tehan v. Shott*, 382 U.S. 406. But, as our earlier quotation from the *Jackson* opinion shows, see p. 13, *supra*, the decision in that case was not premised on the findings that all guilty pleas under the statute had been coerced. To the extent that *Jackson* did "guard against the possibility of unreliable" convictions, *Johnson v. New Jersey*, *supra*, 384 U.S. at 730, the danger of involuntary guilty pleas inherent in the Kidnapping Act was no greater than the danger of compelled confessions inherent in the in-custody interrogations which were the subject of *Johnson*. In any case in which a guilty plea has in fact been coerced by the defendant's fear of the death penalty, see pp. 33-35, *infra*, the nonretroactivity of the right to an unencumbered choice asserted by petitioner will not preclude that defendant from obtaining his release by demonstrating actual coercion. *Johnson v. New Jersey*, *supra*, 384 U.S. at 730; see *Halliday v. United States*, 394 U.S. 831, 833. Therefore, "[t]he values implemented by the right" to such

a choice "would not be measurably served by requiring retrial of all persons convicted in the past" by bench trials or guilty pleas which were not actually involuntary. See *De Stefano v. Woods*, 392 U.S. 631, 634.

2. It is appropriate to submit this additional consideration with respect to the "purpose" of the rule in *Jackson* as a criterion for determining whether that decision requires the setting aside of earlier guilty pleas. Petitioner's argument, which we discussed in the preceding section, rests on the premise that the sole purpose of the *Jackson* rule was to excise an improper consideration from a defendant's choice of plea and mode of trial. That premise finds support in the Court's expressed concern for the effect which the statute had on a defendant's choice at arraignment. But there is, within the *Jackson* opinion itself, the root of a complementary rationale, premised directly on the Sixth Amendment, which leads to the invalidation of the death penalty provision in the interest of those defendants who do exercise their right to a jury trial. This additional policy underlying the *Jackson* holding provides further support for the conclusion that that decision does not affect the validity of guilty pleas entered prior to its announcement.

Our preceding discussion adopted petitioner's assumption, based on the Court's discussion in *Jackson* of the statute's "needless encouragement," that the defect in the death penalty provision was that it had a potential for inducing involuntary guilty pleas and jury waivers. On that assumption, the decision might be viewed as consistent with earlier decisions in which the Court fashioned special rules for situations in

which there is a risk of the deprivation of basic rights. See, *e.g.*, *Miranda v. Arizona*, 384 U.S. 436; *United States v. Wade*, 388 U.S. 218. But on close analysis of the Court's rationale, we doubt whether it is correct to interpret the decision as proceeding solely from a concern that the statute had the potential for inducing involuntary decisions. Assuming *arguendo* that it would be constitutionally permissible to impose the death sentence only on defendants who elect a jury trial, Mr. Justice White's suggestion, in dissent, that careful examination by the trial judge would identify and remedy any cases in which a tendered plea was in fact involuntary would at least obviate the risk of involuntariness in those cases in which involuntariness was most evident. The remedy of rejecting a guilty plea or a jury waiver in those cases where the defendant is obviously overcome by the fear of a death sentence would to that extent fully satisfy any concern for the avoidance of involuntary pleas.

The Court's rejection of that solution to the voluntariness problem—which, it should be noted, would impose on an apprehensive defendant the risk that he fears the most—suggests that an additional policy may have informed the Court's decision. This policy, we believe, is found in the answer to the fundamental question previously assumed—whether, irrespective of any encouragement or potential for involuntariness, it is constitutionally permissible to impose death sentences only on defendants who elect to be tried by a jury rather than by a judge. Resolution of that question might have been viewed as premature in the pro-

cedural posture of the *Jackson* case, since the district court had dismissed the indictment and it could not be known whether the defendant would elect a jury trial. The question would have been squarely framed, however, if the challenge to the death penalty provision had been presented on the petition of a defendant who had elected jury trial, been convicted, and sentenced to death.

If such a case had preceded *Jackson*, there is no doubt that the death penalty provision would have been invalidated, perhaps without reference to the statute's encouragement to plead guilty.¹³ The violation of the defendant's Sixth Amendment right in that case would come squarely within the rationale of *Griffin v. California*, 380 U.S. 609, on which the Court relied in *Jackson*. The unjustified imposition of a more severe penalty on a defendant who exercises his right to a jury trial—like the comment on a defendant's refusal to testify condemned in *Griffin*—is, by itself, an impairment of the constitutional right.

¹³ In a case in this posture, it of course would have been possible for the Court to cite the statute's "inevitable effect" of encouraging guilty pleas and jury waivers as a basis for decision, but the granting of relief to the defendant would raise the problem that he had not been prejudiced by that defect in the statute. Cf. *Bumper v. North Carolina*, 391 U.S. 543, 545. The Court might nevertheless have declared the death penalty provision unconstitutional on that ground and granted relief to the defendant (resentencing) on the theory that such a decision was appropriate to spare future defendants the needless encouragement which the Court found in *Jackson*. But the rationale suggested here would seem to focus more precisely on the fundamental defect in the statute which such a case would have presented.

By placing this condition on the right to a jury trial, the Kidnapping Act deprived defendants of the right which the Sixth Amendment most reasonably affords—*i.e.*, a right to a trial before a jury on the same terms and conditions as a trial before a judge.

To give effect to this underlying policy of the *Jackson* holding, it is not necessary to disturb previous guilty pleas. The purpose of the rule which it compels is not to establish a new right with respect to the defendant's choice of a plea, but rather to vindicate the right to a jury trial for those who chose to exercise it. We, of course, do not suggest that this policy should be viewed as the sole foundation of the *Jackson* decision. Our submission here is only that recognition of this additional ground for the decision is a further justification for the refusal to set aside guilty pleas on the basis of the *Jackson* rationale.

B. THE FACT THAT THE DEATH PENALTY PROVISION "NEEDLESSLY" ENCOURAGED GUILTY PLEAS IS IRRELEVANT TO THE QUESTION WHETHER FEAR OF THE DEATH PENALTY RESULTED IN AN INVOLUNTARY GUILTY PLEA IN THE CIRCUMSTANCES OF A PARTICULAR CASE

1. The decision of the Court of Appeals for the Fourth Circuit in *Alford v. North Carolina*, 405 F. 2d 340, No. 50, this Term (probable jurisdiction noted, 394 U.S. 956), presents a different approach to the problem involved here. Contrary to the position of the petitioner in the instant case, the court in *Alford* did not agree that a defendant who had pleaded guilty was necessarily entitled to post-conviction relief as a matter of law on the basis of *Jackson*. The court did hold, however, that "*Jack-*

son, by defining what are the impermissible burdens" upon the right to contest guilt "defined a new factor to be given weight in determining the voluntariness of a plea" (405 F. 2d at 347). On this premise, the Fourth Circuit concluded that a "prisoner is entitled to relief if he can demonstrate that his plea was a product of those burdens—specifically, that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty" (*ibid.*).¹⁴

Although we agree with the Fourth Circuit that *Jackson* did not establish a new ground for postconviction relief supplanting the test of involuntariness of the guilty plea, we disagree with the court's conclusion that the "needlessness" or "impermissibility" of the encouragement to plead guilty is a factor to be considered in determining whether a defendant's guilty plea was in fact involuntary. The court's holding—that a showing that avoidance of the death penalty was the defendant's principal motivation is sufficient, without more, to establish the involuntariness of a guilty plea—proceeds from a misunderstanding of the significance of this Court's finding in *Jackson* that the differential sentencing provisions were "unnecessary." As we read *Jackson*, the fact that the burden on the right to a jury trial was unnecessary was not a ground for finding that the encouragement was coercive, but rather was a reason for concluding that the

¹⁴ The Fourth Circuit's application of the *Jackson* rationale was premised on its holding that the North Carolina capital punishment provisions (also involved in No. 268, this Term), like the federal kidnapping statute, created an unnecessary encouragement to plead guilty (405 F. 2d at 344-345). We take no position on this question.

burden should be removed in all cases without detailed assessment of the risk of actual coercion.

The Court's observation in *Jackson* that the "inevitable effect" of the death penalty provision is "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial" (390 U.S. at 581) was the beginning rather than the end of the Court's analysis. If the Court had held the death penalty provision invalid on that basis alone, its ruling would have cast doubt upon the validity of a number of statutory schemes which undeniably "encourage" defendants to forego jury trials or enter pleas of guilty to avoid imposition of the death penalty. There are many situations in which, either as a matter of law or as a matter of fact, assertion of the right to contest guilt is inevitably discouraged because "the defendant who abandons the right * * * is assured that he cannot be executed." A prime example is the choice faced by a defendant charged with murder in the first degree, who can preclude the death sentence by pleading guilty to either of the lesser included offenses of murder in the second degree or manslaughter. Similarly, a defendant charged with a capital count and non-capital counts in the same indictment, or under two indictments, one of which is capital, can preclude the death penalty by pleading guilty to the non-capital charges in return for dismissal or non-prosecution of the capital charges. Nor is the inevitable discouragement limited to capital cases; as the dissent below in *Alford* noted, "a defendant may have a greater fear of the risk of a more likely

sentence of life imprisonment than of the risk of less likely capital punishment" (405 F. 2d at 350).¹⁵

The crucial distinction between the foregoing situations and the effect of the Kidnaping Act is that in regard to the former the encouragement to plead guilty is unavoidable, while in regard to the latter it is not. Thus, it has long been thought to be a basic right of a defendant to have the trier of fact consider whether he is guilty of only a less serious degree of the offense with which he is charged. *Stevenson v. United States*, 162 U.S. 313, 314-315; *Berra v. United States*, 351 U.S. 131, 134; *Sansone v. United States*, 380 U.S. 343, 349. On like reasoning, it would appear to be a defendant's right to have the trier consider whether he is guilty of only the less serious of the statutory violations growing out of the same transaction. Yet neither of these rights can be afforded without leaving him an opportunity (and hence an encouragement) to avoid the greater penalty by pleading guilty to the lesser offense. Similarly, a person should not be able to escape prosecution and punishment for one offense merely because he has committed another.

¹⁵ A case presently before the Fourth Circuit is illustrative. The defendant was charged, prior to *Jackson*, with both kidnaping and assault with intent to rape (the maximum penalty for which is twenty years imprisonment), and pleaded guilty to the latter. The decision in *Jackson* intervened before sentencing, and consequently the court, informing him that he would no longer risk a death sentence if he were to be convicted by the jury of kidnaping, offered him an opportunity, which he rejected, to withdraw his guilty plea. Upon appeal he contends that he pleaded guilty initially because of fear of the death penalty and thereafter rejected the opportunity to withdraw the plea because of fear of a life sentence. *United States v. Tucker*, No. 12,618, Appellant's Br. 6, 8.

Yet multi-count indictments or several indictments brought against the same person for different offenses necessarily encourage the defendant to minimize his punishment by means of a guilty plea to a single indictment or to a single count.

In *Jackson*, the government had argued that the sentencing structure of the Kidnapping Act had the ameliorative purpose of "mitigat[ing] the severity of capital punishment" by "limiting the death penalty to cases in which a jury recommends it" (390 U.S. at 582). Although the Court found this purpose to be "an entirely legitimate one," it concluded that the purpose "can be achieved without penalizing those defendants who plead not guilty and demand jury trial" (*ibid.*). Accordingly, the Court held that the encouragement of guilty pleas and jury waivers was impermissible because it "needlessly penalizes the assertion of a constitutional right." *Id.* at 583. Thus, while lesser included offenses, multi-count indictments and multiple indictments encourage guilty pleas as much as do statutes which, like the Kidnapping Act, condition imposition of the maximum penalty upon a jury determination, only in the case of a statutory scheme which involves *needless* encouragement does *Jackson* hold the burden to be constitutionally impermissible.

2. To rely, as the Fourth Circuit did in *Alford*, on the "impermissibility" of the burden as a crucial factor in assaying the extent of coercion is to misconstrue the nature of coercion. The Court in *Jackson* invalidated the death penalty provision because the statute's

encouragement of guilty pleas was avoidable. But avoidability provides only a reason for removing the source of the encouragement; it adds nothing to the encouragement's compelling force.

Petitioner in the present case, for example, was undoubtedly "encouraged" to plead guilty by fear of the death penalty. But although his offense, which involved multiple rape, was sufficiently heinous for a capital recommendation by a jury to be a realistic possibility, such a recommendation was not certain, nor even highly probable. In its entire history, only six persons have been executed for violating the Kidnapping Act, and only the first did not kill his victim under egregious circumstances.¹⁶ Thus while the encouragement which the statute afforded petitioner to plead guilty was "impermissible", it was hardly more compelling than the unavoidable (and hence permissible) encouragement of a guilty plea to second degree

¹⁶ Arthur Gooch, who was convicted in 1934 and executed in 1936 at the height of the "outlaw gang" era when public outrage was intense. See *Gooch v. United States*, 82 F. 2d 534, 536 (C.A. 10), certiorari denied, 298 U.S. 658. Henry J. Seadlund (executed in 1938) deliberately killed his victim after receiving the ransom money. See *Seadlund v. United States*, 97 F. 2d 742, 744 (C.A. 7). Bonnie Brown Heady and Carl Austin Hall (executed in 1953) kidnapped a seven-year old boy whom they killed while continuing to negotiate for the ransom (No. 18671, W.D. Mo., 1953). Arthur Ross Brown (executed in 1956) kidnapped, then raped and immediately thereafter shot to death a young housewife and mother (No. 19376-Cr., W.D. Mo., 1956). Victor Harry Feguer (executed in 1961) lured a doctor from his home upon a false mission of mercy, kidnapped him and thereafter killed him. See *Feguer v. United States*, 302 F. 2d 214, 220-221 (C.A. 8), certiorari denied, 371 U.S. 872.

murder or manslaughter which an indictment for first degree murder affords.¹⁷

The erroneous premise of the "principal motivation" test formulated by the Fourth Circuit in *Alford* is illustrated by the fact that the defendant in that case pleaded guilty to murder in the second, rather than the first, degree. "To us," the court said, "the *Jackson* defect in the North Carolina statutes potentially infects the validity of the acceptance of a plea of guilty to any lesser included offense," although

¹⁷ There is more compelling encouragement, in fact, to plead guilty to second degree murder or manslaughter than there was before *Jackson* to plead guilty to kidnapping. A kidnapping defendant could have contested his guilt and still avoided the risk of capital punishment by waiving a jury trial, while a bench trial for murder affords no insurance against the death penalty. Compare *Pindell v. United States*, 296 F. Supp. 751, 753 n. 3 (D. Conn.). Additionally, a guilty plea to second degree murder or manslaughter precludes any possibility of the death penalty being assessed, while until this Court held to the contrary in *Jackson* (390 U.S. at 576-581) it was assumed that a jury could be convened to assess penalty after a guilty plea to kidnapping was accepted. *Seadlund v. United States*, *supra*, 97 F. 2d at 748; see also *United States v. Dalhover*, 96 F. 2d 355 (C.A. 7), certiorari denied, 305 U.S. 632. The death sentences for four of the six persons executed for kidnapping (Seadlund, Heady, Hall and Brown) were, in fact, recommended by such after-convened juries. Concededly, the jury waiver avenue of escape was apparently unavailable to petitioner here, since the judge who accepted his plea let it be known in advance that he would not consider a bench trial. On the other hand, while the judge also expressed disapproval of the penalty jury procedure, he did not do so until petitioner's plea was tendered and accepted; petitioner thus had no way of knowing in advance that his plea would totally foreclose the possibility of capital punishment. Compare *McFarland v. United States*, C.A. 4, No. 13,146, decided May 1, 1969, petition for certiorari pending, No. 830 Misc., this Term.

there is "a higher burden of proof" upon one attacking such a plea. 405 F. 2d at 347 n. 17. The "*Jackson* defect" which the court found in the state statutory scheme, however, was that capital punishment could be avoided by a guilty plea to *first* degree murder; were it not for that statutory provision, the state's sentencing structure would, in the court's eyes, apparently have been free of fault (see *id.* n. 19). Thus, if a defendant whose "principal motivation * * * was to avoid the death penalty" (405 F. 2d at 347) pleaded guilty to second degree murder, and that had been the only statutory avenue of avoidance open to him, his plea would not, under the court's reasoning, have been coerced. Yet the *same* motivation was held to make the *same* plea coerced because the alternative but unused avenue of pleading to first degree murder—which the court found to be impermissible—was also left open to him by statute.

Contrary to the Fourth Circuit's position, fear of the death penalty, even if a principal motivation for the plea, can hardly be deemed the equivalent of coercion.¹⁸ A normal motivation—quite often the princi-

¹⁸ Courts which have considered the question whether a reasonable fear of the death penalty is *per se* coercive and consistently held that it is not:

Guilty plea which precluded a death recommendation by the jury: *Overman v. United States*, 281 F. 2d 497, 499 (C.A. 6). Guilty plea to lesser included non-capital offense: *United States ex rel. Robinson v. Fay*, 348 F. 2d 705, 707 (C.A. 2), certiorari denied, 382 U.S. 997; *Godlock v. Ross*, 259 F. Supp. 659, 661 (E.D.N.C.). Plea of non-vult to first degree murder, upon which no greater sentence than life imprisonment could be imposed: *Laboy v. New Jersey*, 266 F. Supp. 581, 584 (D. N.J.). Guilty plea to non-capital counts in return for dismissal of capital count: *Martin v. United States*, 256 F. 2d 345, 347-349 (C.A. 5),

pal motivation—of a defendant who enters a plea of guilty to a lesser included offense is the fear that a trial on the greater charge might lead to a more severe sentence, whether the greater charge carries with it the possibility of death or merely a long term of years. If motivation alone were decisive, a defendant would never be in a position to make those decisions which are essential to the proper operation of our criminal law system (see *Jackson*, 390 U.S. at 584-585).¹⁰

certiorari denied, 358 U.S. 921; *Gilmore v. People of State of California*, 364 F. 2d 916, 918 (C.A. 9). Guilty plea to capital indictment upon understanding that prosecutor would either recommend against or not press for the death penalty: *Busby v. Holman*, 356 F. 2d 75, 80 (C.A. 5); *Cooper v. Holman*, 356 F. 2d 82, 85 (C.A. 5), certiorari denied, 385 U.S. 855. Guilty plea to non-capital federal indictment in return for promise by state prosecutor to dismiss capital state indictment: *United States v. Thomas*, C.A. 9, No. 22,658, decided August 12, 1969. Guilty plea which precluded a capital direction by federal jury, induced in part by hope that capital state indictment would consequently be dismissed: *McFarland v. United States*, 284 F. Supp. 969, 977-978 (D. Md.), affirmed, C.A. 4, No. 13,146, decided May 1, 1969), petition for certiorari pending, No. 830 Misc., this Term.

¹⁰ See A.B.A., Project on Minimum Standards for Criminal Justice, *Standards Relating to Pleas of Guilty*, pp. 60-76 (1967), which recognizes the advantages to the accused and to the criminal justice system of guilty pleas entered pursuant to agreements with the prosecuting attorney and which promulgates standards for ensuring that such agreements result in accurate and voluntary dispositions. See generally Newman, *Conviction* (1967).

C. TESTED UNDER THE TRADITIONAL STANDARD FOR DETERMINING THE VOLUNTARINESS OF A GUILTY PLEA—WHETHER THE DEFENDANT WAS DEPRIVED OF THE CAPACITY TO MAKE A FREE AND RATIONAL DECISION—THE FACTS IN THIS CASE ESTABLISH THAT PETITIONER'S GUILTY PLEA WAS VOLUNTARY

1. Regardless of the maximum penalty involved, the generally accepted test for the voluntariness of a guilty plea is not whether fear of the penalty was a "definite factor" in the defendant's determination, as petitioner urges (Br. 35), or the "principal motivation" for the plea, as the court of appeals held in *Alford* (405 F. 2d at 347, 349), but rather whether that fear or any other inducement to which the defendant was subjected was sufficient to overcome his capacity to make a free and rational decision. See, e.g., *Busby v. Holman*, 356 F. 2d 75, 80 (C.A. 5); *Cortez v. United States*, 337 F. 2d 699, 701 (C.A. 9), certiorari denied, 381 U.S. 953; *Alden v. Montana*, 234 F. Supp. 661, 670 (D. Mont.), affirmed, 345 F. 2d 530 (C.A. 9); *United States v. Tateo*, 214 F. Supp. 560, 565 (S. D. N.Y.); *Laboy v. New Jersey*, 266 F. Supp. 581, 584 (D. N.J.). A plea "motivated" by a desire to avoid more stringent punishment is not involuntary if it is "a well considered, prudent choice of the lesser of two evils." *Barber v. Gladden*, 327 F. 2d 101, 104 (C.A. 9), certiorari denied, 377 U.S. 971. Although this Court has not had occasion to speak definitively on this issue,²⁰ the "capacity for choice" test is con-

²⁰ The cases which the Court has considered (such as *Machibroda*, *Waley*, and *Walker*) have involved the issue whether a defendant is entitled, on the basis of his allegations, to a hearing on his claim of coercion. To our knowledge, no case has been before the Court involving the issue whether coercion was established by the evidence adduced at a postconviction hearing.

sonant with the standard which it has enunciated for evaluating the voluntariness of a confession. See, e.g., *Lisenba v. California*, 314 U.S. 219, 241; *Blackburn v. Alabama*, 361 U.S. 199, 207-208; *Rogers v. Richmond*, 365 U.S. 534, 544; *Miranda v. Arizona*, 384 U.S. 436, 464-465; *Garrity v. New Jersey*, 385 U.S. 493, 497.

An accused makes "a well considered, prudent choice of the lesser of two evils" when, having the reasonable "belief that his acts were proscribed by law and that he cannot successfully be defended," he concludes that a guilty plea is mandated by "the dictates of self-interest" because it offers him something valuable in return—frequently, as in this case, an opportunity to mitigate his sentence. See *Adams v. United States ex rel. McCann*, 317 U.S. 269, 276. Thus, the essential inquiry in assessing the voluntariness of a guilty plea is whether the defendant's fear of the consequences of an unsuccessful contest of his guilt was such as to deprive him of the capacity to make an intelligent evaluation of his chances for acquittal and act rationally on that evaluation.²¹

²¹ Proceeding from the premise that a guilty plea which was "needlessly encouraged" by the death penalty provision is "involuntary" as a matter of law (see p. 12 n. 7, *supra*), petitioner argues that the test should be whether the death penalty was a "definite factor" in the defendant's decision; he supports this test by an analogy to guilty pleas which are "based" upon or "caused" by a coerced confession, assuming that such pleas are "involuntary" (Br. 35-41). However, the question of whether a defendant is entitled to a habeas corpus hearing on a claim that his guilty plea was induced by a coerced confession is before this Court in *McMann v. Ross*, No. 153, this Term, certiorari granted, October 13, 1969. Even if the Court in that case holds that guilty pleas following coerced confessions may be invalid in certain circumstances, that decision need not rest on principles which are

In resolving this question, which must be decided on the facts of each case, it is clear that involuntariness cannot be found from the mere fact that the accused is made aware of the penalty which may be imposed after trial and of the effect which a guilty plea may have in avoiding that penalty. "[A] fair description" by the trial court "of the consequences attendant upon the [defendant's] choice of plea" is "manifestly essential to an informed decision on [his] part." *United States ex rel. McGrath v. LaVallee*, 319 F. 2d 308, 314 (C.A. 2); same, 348 F. 2d 373, 376 (C.A. 2), certiorari denied, 383 U.S. 952. Nor is it improper for the prosecutor to announce his intention to seek the maximum penalty if the case goes to trial. *Barber v. Gladden*, 220 F. Supp. 308, 314 (D. Ore.), affirmed, 327 F. 2d 101, *supra*; *Lattin v. Cox*, 355 F. 2d 397, 400 (C.A. 10). To be sure, it may be found that the defendant's capacity to evaluate the true realities of his situation was impaired where the court or prosecutor put so much stress upon the risks which he would incur by contesting that their statements "were

relevant to the question whether a plea was involuntary. The relationship between a coerced confession and a guilty plea invokes considerations which go beyond the "voluntariness" concept at issue in this case. A guilty plea, to be valid, must be more than just a product of the defendant's own free choice; it must be made "after proper advice and with full understanding of the consequences." *Kercheval v. United States*, *supra*, 274 U.S. at 223. If a defendant's conclusion that he cannot successfully be defended is based on consideration of a confession which, unbeknownst to him, is subject to suppression, his consequent guilty plea might not meet the *Kercheval* standard.

reasonably calculated to influence [him] to the point of coercion into entering [his plea] of guilty." *Euziere v. United States*, 249 F. 2d 293, 295 (C.A. 10). But petitioner properly does not claim any overreaching by the court or prosecutor in this case.

Unlike the court or prosecutor, a defendant's counsel is specifically charged with the duty "to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (plurality opinion); see *Williams v. Kaiser*, 323 U.S. 471, 475-476. Such an informed opinion necessarily must include a relative evaluation both of the chances of acquittal and of the probable difference between the severity of the penalty which will be imposed after an unsuccessful trial and that which will be imposed on a guilty plea. See *Moore v. Wainwright*, 401 F. 2d 525, 526 (C.A. 5). If after examining the law and facts, counsel is convinced that there is virtually no chance for an acquittal and that a guilty plea provides the only hope for avoiding a probable sentence of death or lengthy imprisonment, it is counsel's duty to encourage the defendant to plead guilty. The defendant is not overreached in these circumstances; any pressures to which he is subject are only those which "have emanated from the realities of the situation." See *United States ex rel. McGrath v. LaVallee*, *supra*, 319 F. 2d at 314.

When it is shown only that a defendant appreciated the risk of a death sentence after trial and heeded the considered advice of competent counsel to plead

guilty, there is no basis for concluding that his capacity to make a voluntary choice was overborne by fear. See *Laboy v. New Jersey, supra*, 266 F. Supp. at 584. To conclude that a defendant was acting irrationally under an incapacitating fear of the death penalty, it would have to be shown that his choice was not "prudent"—i.e., that despite his plea, he was in fact innocent, or at least that counsel had encouraged him to surrender a substantial defense.²² This does not mean that only the innocent are entitled to relief from coerced pleas. But, while guilt or innocence is irrelevant to relief if a defendant's guilty plea is shown to have been coerced, it "is not irrelevant on the issue of whether his plea was, in fact, coerced." *Barber v.*

²² The district court's decision in *Shaw v. United States*, 299 F. Supp. 824 (S.D. Ga.), illustrates the effect which an analysis of the government's proposed proof and the evidence available to the defense may have on a postconviction determination of the voluntariness of a guilty plea. The defendant, a man in his fifties with a long prior record, pleaded guilty to kidnapping a fourteen year old girl for coition purposes and releasing her harmed. The evidence available to the government showed that he had transported both the fourteen year old and another girl of sixteen from Georgia to the Washington area, where he engaged in intercourse with both of them. The district court, reviewing the evidence, determined that much of the government's evidence was consistent with the conclusion that the girls were not being held against their will and that the government's case appeared "to have much greater resemblance to a Mann Act violation than a kidnapping charge" (299 F. Supp. at 832). Against this background, the court concluded that the defendant's will to contest his guilt was overborne by his counsels' insistence that—in light of the youth of the girl and the defendant's prior record—a guilty verdict and a capital recommendation would be the likely outcome of a jury trial. *Id.* at 833.

Gladden, supra, 220 F. Supp. at 313; *Shupe v. Sigler*, 230 F. Supp. 601, 605 (D. Neb.).

2. Under the foregoing analysis, the facts in the present case detailed in the Statement, *supra*, demonstrate that petitioner's guilty plea was voluntary. Neither the prosecutor nor the trial court advised the petitioner or attempted in any manner to influence him to plead guilty. Except for his mother's admonition, the only advice which petitioner received to plead guilty came from his counsel, who, he acknowledges, were "competent attorneys and experienced in handling criminal matters" who "did not do anything wrong" (Br. 54-55). Counsels' advice was given only after they had concluded, on the basis of thorough investigation, that there was no likelihood of a successful defense and that a jury trial would result in almost certain conviction and would needlessly expose petitioner to the substantial risk of the death penalty. Petitioner himself, as the district court found, had already come to the same conclusion after learning that his codefendant intended to plead guilty. Nor was there any defect in the proceedings at which petitioner entered his guilty plea.²³ Indeed, petitioner made no effort to assert his innocence, despite being given an opportunity to withdraw his plea prior to imposition of sentence.²⁴

²³ See *McCarthy v. United States*, 394 U.S. 459, 465; *Halliday v. United States*, 394 U.S. 831, 833.

²⁴ Unlike petitioner here (and as far as the record shows, petitioner in No. 268 as well) respondent in No. 50 specifically asserted, when he tendered his plea, that he had not committed the homicide with which he was charged and was pleading guilty "because they said if I didn't they would gas me for it"

In these circumstances, the coercive pressures to which petitioner was subject were only those which "emanated from the realities of the situation." There is nothing to suggest that fear of the death penalty overcame his capacity to make a prudent decision with respect to his chance for an acquittal after a trial. At his hearing he offered no evidence, other than his own belated assertion of innocence, to dispute Mr. LaFollette's assessment at the time of the plea that conviction was certain, and he does not dispute that view of the case in this Court but rather emphasizes it (see Br. 10, 48, 50, 54-55). Although it is undoubtedly true that petitioner was motivated to avoid the possibility of a death penalty, there is no basis for concluding that his capacity for rational choice was overborne. Rather, there is sound reason for con-

(Appendix in No. 50, p. 7; see also *id.*, at 8-9). Despite this obvious warning that the plea might not, in fact, have been voluntary the judge made no attempt to explore respondent's state of mind. Rather, he restricted his inquiries to respondent's prior criminal record and then imposed sentence (*id.*, A. 9-11). The court of appeals viewed respondent's assertions of innocence as proof that his plea was primarily motivated by "the incentive supplied" by the State "statutory scheme," and was hence involuntary. 405 F.2d at 347-349. The circumstances of the tender and acceptance of the plea, however, suggests that it may have been unnecessary to reach the question of voluntariness since the conviction would appear to be vulnerable on grounds of the insufficiency of the inquiry made by the judge. See *Boykin v. Alabama*, 395 U.S. 238. Although protestations of innocence accompanying a guilty plea would not preclude a judge from accepting the plea or necessarily demonstrate that such a plea was involuntary, see *McCarthy v. United States*, 394 U.S. 459, 471, the judge does have a particular duty to conduct further examination of the defendant in order to resolve the contradiction and dispel any doubt as to the voluntariness of the plea before he may accept it.

cluding that petitioner's choice was calculated and reasoned and in accord with the sound advice of counsel seeking the best route for his client.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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